MOHAMED NORDIN BIN MOHAMAD ZAHARI & ANOR.

v.

KERAJAAN MALAYSIA & ANOR.

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CIVIL APPEAL NO. 12-23-93]
5 OCTOBER 1993

TORT: Road accident involving a motor cycle with 2 pillions and a parked land rover - Appellant overtook the parked land rover on its left - Breach of r. 20 Highway Code - Section 68(3) of Road Transport Act 1987 - Prima facie case of negligence - Second appellant's right knee came into contact with left bumper of stationary land rover - Whether appellate Court would disturb finding of fact of trial Court.

This was an appeal by the appellants, the rider of a motor cycle and his two pillions against the finding of the Sessions Judge, Taiping, wherein the appellants were held solely negligent and the appellants' claim dismissed with costs.

Held:

[1] Overtaking a stationary land rover to its left must surely be in breach of r. 20 of the Highway Code and this breach can be used to invoke s. 68(3) of the Road Transport Act 1987 which raises a *prima facie* case of negligence against the first appellant.

[2] This was not a case where the land rover suddenly stopped without warning thereby resulting in a rear collision. This was a case where the land rover had parked for some 20 minutes before the accident occurred.

[3] There was evidence that though the land rover was parked on the left side of the road, yet the second respondent waited and sat behind the wheel and he saw it fit to switch on the tail and indicator lights. The Sessions Court Judge was entitled to accept the version of the second respondent and she did just that.

[4] The appeal revolves on the finding of fact by the Sessions Court Judge and an appellate Court would be slow in disturbing such finding of fact. Reading the cold print of the appeal record would put a great disadvantage on the appellate Court as compared to the trial Judge who had the best advantage of seeing and hearing the witnesses. The trial Judge had, from the grounds of judgment, amply considered the materials before her.

[Appeal dismissed with costs].

Cases referred to:

M.A. Clyde v. Wong Ah Mei & Anor. [1970] 2 MLJ 183 FC ***(refd)***

Chop Seng Heng v. Thevannasan & Ors. [1975] 2 MLJ 3 PC ***(refd)***

Yew You & Anor. v. Mah Poay Koh & Anor. [1970] 1 MLJ 57, 59 ***(refd)***

Yahaya bin Mohamad v. Chin Tuan Nan [1975] 2 MLJ 117 ***(refd)***

Multar v. Lim Kim Chet & Anor. [1982] CLJ 107 / [1982] 1 MLJ 184 FC ***(refd)***

Mat Desa bin Salleh v. Ang Hock Lee & Anor, Quantum in Accident Claims, Vol. 3, p. 223 ***(refd)***

Bak Bee Chee & Anor. v. Sgt. Leon Colin Anesbury [1986] 2 CLJ 222 ***(refd)***

Zakaria bin Sam, Quantum in Accident Claims, Vol. 3, p. 313 ***(refd)***

Jamaliah bte Mohamad (infant) v. Ng Fook Seng [1982] 2 MLJ xiviii ***(refd)***

Phuah Jee Suan v. Nila Vasu Pillai [1973] 1 MLJ 180, 188 CA ***(refd)***

Oli Mohamed v. Keith Murphy & Anor. [1969] 2 MLJ 244 ***(refd)***

Wong Fook @ Wong Fong & Anor. v. Abdul Shukor bin Abdul Halim & Anor. [1990] 2 CLJ 382 ***(refd)***

Reliance Omnibus Co. Sdn. Bhd. & Anor. v. Ishak bin Mohd. Jaafar & Anor. [1993] 4 CLJ 291 ***(refd)***

Legislation referred to:

Highway Code, r. 20
Road Transport Act 1987, s. 68(3)
Road Traffic Ordinance 1958, s. 59(4)

Other sources referred to:

Quantum in Accident Claims, K.S. Dass, Vol. 3, pp. 223, 313

For the appellants - Sarjeet Singh Sandhu; M/s. Sandu & Co.
For the respondents - B. Saralapillai, SFC

JUDGMENT

Haji Abdul Malik bin Haji Ishak JC:

This was an appeal by the appellants against the finding of the Judge, Sessions Court, Taiping, Perak wherein the appellants were held solely negligent and that the appellants' claim be dismissed with costs.

It was common ground that, on 29 August 1990, at about 5.00 p.m., the first appellant was riding motorcycle bearing registration number PS 1666 along the Jalan Ijok/Taiping with his wife, the second appellant as pillion rider. Another pillion was the first appellant's young daughter by

the name of Norsalwa, who was at the material time, 3 months old and sandwiched between the first and second appellants on the said motorcycle. A land rover bearing registration number BAY 8700 was parked by the second respondent, who was the servant or agent of the first respondent, near the left side of the road in the direction of Jalan Ijok/Taiping. At the time and place in question, a collision took place, ironically, between the right knee of the second appellant that hit the left front bumper of the land rover when the first appellant overtook the stationary land rover on its left. As a result of this accident, the second appellant sustained injuries. The stretch of road where the accident took place was a kampong road, straight, metalled and measured 12 feet in width. It was raining at the time of the collision.

It was in evidence that the first appellant first saw the stationary land rover some 100 feet away. It was raining and to protect their 3 month old daughter from the rain, both appellants huddled closer to one another with their legs spread widely thereby giving some protective measure to their daughter who sat in the centre. The first appellant also stated that he decided to overtake the stationary land rover on the left side of the road as he thought that it would be dangerous to overtake on the right side of the road. Though it was a kampong road, there was ample space for a car to overtake the stationary land rover on its right side. The space on the left side of the land rover was barely 1 feet 1 inch to the edge of the grass verge but the grass path was 6 feet wide (see the sketch plan and the key) - an ample space for the first appellant to manoeuvre, if done cautiously. Unfortunately, by a stroke of misfortune, a misjudgment on the first appellant's part, the second appellant's right knee came into contact with the left bumper of the stationary land rover. The second appellant and their daughter were thrown off the motorcycle. The second appellant sustained the following injuries:

(a) compound comminuted fracture upper third of right tibia and fibula.
(b) fracture to the right medial malleolus.

After sometime, the following healed scars were noted on the second appellant:

(a) 18cm transverse keloid scar over the right upper tibia.
(b) 20cm longitudinal keloid scar over the right tibia.
(c) 17cm transverse keloid scar over the posterior aspect of the right ankle.

The Judge, Sessions Court, Taiping, Perak was entitled to accept the version of the second respondent and she did just that. There was evidence that though the land rover was parked on the left side of the road, yet the second respondent waited and sat behind the wheel and he saw it fit to switch on the tail and indicator lights. Overtaking a stationary land rover to its left must surely be in breach of r. 20 of the Highway Code (see *M.A. Clyde v. Wong Ah Mei & Anor.* [1970] 2 MLJ 183 FC, where the Court held that a breach of r. 28 of the Highway Code can be used to invoke s. 59(4) of the Road Traffic Ordinance 1958 raising a *prima facie* case of negligence). This was not a case where the land rover suddenly stopped without warning thereby resulting in a rear collision. This was a case where the land rover had parked for some 20 minutes before the accident occurred.

The case of *Chop Seng Heng v. Thevannasan & Ors.* [1975] 2 MLJ 3 PC was cited for the proposition that reckless parking would pose a danger to other road users and must constitute negligence. But the facts in *Chop Seng Heng's* case are poles apart from the present appeal. There the road was winding and quite misty which reduced visibility. At night, the first defendant stopped his lorry at "a blind left-hand bend" as his mate wanted to urinate. The lorry was parked on its correct side and with its lights on, including the offside rear flasher. Yet, the fourth defendants' empty lorry crashed into its rear. In the present appeal, from the recital of the facts, the kampong road was straight and it was on this straight road that the second respondent parked his land rover on its correct leftside. The accident happened in late afternoon and, though raining, visibility was still good as the first appellant saw the parked land rover some 100 feet away. At the material time of the accident, there were two pillion riders. The motorcycle did not crash into the rear of the stationary land rover but the right knee of the second appellant got entangled with the left front bumper of the land rover when the first appellant overtook the land rover to its left. It follows, therefore, that *Chop Seng Heng's* case cannot apply to the present appeal.

It is now trite law that in an action for negligence, the onus of proof rests with the plaintiff. The adage: he who asserts must prove, would

surely apply in all cases of negligence (see *Yew You & Anor. v. Mah Poay Koh & Anor.* [1970] 1 MLJ 57, 59). It is a pity that the second appellant sustained injuries as a result of the accident. Unfortunately, in this country, she must establish negligence before an award of damages could be made.

Basically, the appeal revolves on the finding of fact by the Judge, Sessions Court, Taiping, Perak. An appellate Court would be slow in disturbing such finding of fact (*Yahya bin Mohamad v. Chin Tuan Nan* [1975] 2 MLJ 117). Reading the cold print of the appeal record would put a great disadvantage on the appellate Court as compared to the trial Judge who had the best advantage of seeing and hearing the witnesses. The trial Judge had, from the grounds of judgment, amply considered the materials before her. For these reasons, the appeal is dismissed with costs.

One other point needs mention. The Judge, Sessions Court, Taiping, Perak failed to assess the damages provisionally after she had dismissed the appellants' claim. She should have proceeded to provisionally assess the damages (*Multar v. Lim Kim Chet & Anor.* [1982] 1 MLJ 184 FC).

Now, from the appeal record, I would assess the quantum on 100% liability as follows. The first appellant did not suffer any bodily injury and his claim was in relation to the special damages as itemised in the statement of claim (p. 46). Only items (b) and (c) are allowed. As to item (b) there was evidence of the transport charges incurred by the first appellant while visiting the second appellant in the General Hospital, Ipoh for the duration of 16 weeks (from 30 August 1990 to 24 December 1990) at RM300 per month. This would bring a grand total of RM4,800 (RM300 x 16 weeks). An award of RM12 for the costs of the police report, the sketch plan and the key thereof would also be made.

The second appellant must have suffered tremendously. Her injuries are quite serious. For general damages incorporating pain and suffering and loss of amenities, the following awards would be made. It must be stressed that it is difficult to award similar amounts because no two cases are alike. For the fracture of the right tibia and fibula, a sum of RM20,000 would be awarded based on two comparables. Firstly, *Mat Desa bin Salleh v. Ang Hock Lee & Anor.*, Quantum in Accident Claims by K.S. Dass, Vol. 3 at p. 223 where RM18,000 was awarded for, *inter alia*, fracture of the right fibula above which there was a lacerated wound 3" x 2" on the lower third about 2" of the bone protruding out of the wound, compound comminuted fracture on mid-shaft of right tibia, fracture of lateral condyle of right tibia. Secondly, *Bak Bee Chee & Anor. v. Sgt. Leon Colin Anesbury* [1986] 2 CLJ 222, where RM15,000 was awarded for, *inter alia*, fracture of right tibia and fibula and punctured wound over the anterior aspect of the right tibia and fibula resulting in 1cm shortening. For the fracture of the right medial malleolus, a sum of RM15,000 would be awarded based on *Zakaria bin Sam*, Quantum in Accident Claims by K.S. Dass, Vol. 3 at p. 313 where RM14,500 was awarded for, *inter alia*, fracture of the medial malleolus of the left ankle.

For the severe scarring and infection, an award of RM15,000 would be made, based on *Jamaliah bte Mohamad (infant) v. Ng Fook Seng* [1982] 2 MLJ xiviii where RM14,000 was awarded. I have seen the photographs and the consultant orthopaedic surgeon's report and it is apparent that the second appellant's keloid scars are quite extensive and ugly. On the basis of overlapping (*Phuah Jee Suan v. Nila Vasu Pillai* [1973] 1 MLJ 180, 188 CA), a global award of RM40,000 would be awarded to the second appellant under this head.

An award of RM390 for the special damages claimed by the second appellant would be made being: RM310 for the specialist report, RM40 for the report from General Hospital, Ipoh and RM40 for the report from District Hospital, Taiping.

The second appellant being a pillion rider, an innocent third party, is entitled to recover the whole of the damages in this case. She is entitled to recover the whole of the damages (100%) from either the first appellant or the respondents (see *Oli Mohamed v. Keith Murphy & Anor.* [1969] 2 MLJ 244, *Wong Fook @ Wong Fong & Anor. v. Abdul Shukor bin Abdul Halim & Anor.* [1990] 2 CLJ 382 and *Reliance Omnibus Co. Sdn. Bhd. & Anor. v. Ishak bin Mohd. Jaafar & Anor.* [1993] 4 CLJ 291.

The usual interests would accrue for both general and special damages.

Appeal dismissed with costs.